IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON COUNTS 4 & 5 OF THE SECOND AMENDED COMPLAINT AND INTEGRATED BRIEF IN SUPPORT

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The undersigned Defendants respectfully move for summary judgment on Plaintiffs' state law claims for public and private nuisance (Count 4) and Plaintiffs' federal common law nuisance claim (Count 5) in the Second Amended Complaint, Dkt. No. 1215 (July 16, 2007) ("SAC")). This lawsuit seeks to expand the law of nuisance to provide claims against entire industries based on the lawful use of a product, and thus is closely analogous to several recent rulings denying similar public nuisance claims. *See, e.g., Rhode Island v. Lead Indus. Ass'n, Inc.* ("*LIA*"), 951 A.2d 428, 449 (R.I. 2008); *In re Lead Paint Litig.*, 924 A.2d 484, 499 (N.J. 2007). Plaintiffs' effort must likewise be rejected, as it is not supported by the nuisance law of either Oklahoma or Arkansas.[1] Plaintiffs cannot demonstrate (and have now disclaimed) any state law claim based on the doctrines of nuisance *per se* or private nuisance. Similarly, Plaintiffs cannot sustain a state law claim of public nuisance because the alleged nuisance—the use of poultry litter as a natural fertilizer—is not controlled by the Defendants, and is specifically regulated and authorized by the law of both States. Further, even if Plaintiffs could demonstrate a public nuisance, partial summary judgment would still be appropriate on Plaintiffs' claim for damages, because the State may recover under public nuisance only for proper abatement costs. Finally, Plaintiffs' federal common law nuisance claim (Count 5) must be dismissed for all the same reasons as Count 4.

[1] While Plaintiffs have conceded they lack standing to recover for alleged injuries occurring in Arkansas, *see* Dkt. No. 1822 at 2 n.3 (Jan. 8, 2009), they continue to assert standing to raise claims based on conduct throughout the entire Illinois River Watershed ("IRW"), including in the State of Arkansas. *See, e.g.*, SAC ¶¶21-30, 45-63, 97-107. It is well-established that Arkansas' nuisance law governs conduct occurring in Arkansas, while Oklahoma law applies to conduct in Oklahoma. Where a plaintiff alleges that conduct in a "source state" causes injuries in a different "affected state," a state-law nuisance claim may proceed only where supported in the law of the source state. *Int'l Paper Co. v. Ouellette, et al.*, 479 U.S. 481, 487 (1987); *see also Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) ("[T]he Commerce Clause precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.") (internal quotations omitted).

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Illinois River Watershed ("IRW") comprises approximately 1,069,530 acres, located half in Oklahoma (approximately 576,030 acres), and half in Arkansas (approximately 493,500 acres). *See* SAC ¶21; SAC Ex. 1. The IRW encompasses portions of seven counties (three in Arkansas and four in Oklahoma) as well as at least thirteen cities and towns. *See id*.

2. Plaintiffs have not identified specific lands in the IRW in which the State of Oklahoma maintains title, property, or ownership interests that have been physically invaded, injured, or otherwise the subject of a nuisance. Plaintiffs have alleged only a generalized "possessory property interest in the water in that portion of the [IRW] located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." SAC ¶119; *see* June 15, 2007 Hearing Tr. at 176:11-22 (Ex. 1).

3. Poultry litter is a widely utilized fertilizer, which provides soil nutrients, increases crop yields and outperforms commercial fertilizers. *See, e.g.*, Ex. 2 at 1, 2 ("Poultry Litter is an excellent, low cost fertilizer [that] returns nutrients and organic matter to the soil, building soil fertility and quality."); Ex. 3 at 1 ("Applying animal manure to farmland is an appropriate and environmentally sound management practice [that] recycle[s] nutrients from manure to soil for plant growth and add organic matter to improve soil structure, tilth, and water holding capacity."); Ex. 4 ("[Poultry] litter can be utilized as a fertilizer for pastureland, cropland and hay production [and is] an excellent source of … nitrogen, phosphorus and potassium. In addition, litter returns organic matter and other nutrients to the soil, which builds soil fertility and quality."); Ex. 5 at 31:11-14, 540:19-541:4, 1764:23-1768:9 ("P.I.T."); Peach Dep. at 45:7-45:10, 126:22-128:9, 136:17-137:24 (Ex. 6); Ex. 7 at 7-8.

4. Oklahoma and its agents recognize poultry litter as an effective fertilizer, and actively

encourage and approve of its use. *See, e.g.*, 2 O.S. § 10-9.1, *et seq.*; O.A.C. § 35:17-5-1; Ex. 8 ("The Oklahoma Litter Market website serves as a communication link for buyers, sellers and service providers of poultry litter."); Ex. 9 (providing a "Fertilizer Value Calculator" to "calculate [the] value of nutrients in [poultry] litter"); Peach Dep. at 79:3-79:9 ("Oklahoma Conservation Commission teach[es] people how to … apply … and use litter in the IRW") (Ex. 6); Undisputed Facts ¶3 (citing statements by agents of Oklahoma).

5. Arkansas also recognizes poultry litter as an effective fertilizer, and encourages and approves its use. *See, e.g.*, Ark. Code Ann. §§ 15-20-902, 15-20-1102.

6. Oklahoma and Arkansas authorize and comprehensively regulate the land application of poultry litter within their respective state boundaries. *See* 2 O.S. § 10-9.1 *et seq.*; 2 O.S. § 10-9.13 *et seq.*; 2 O.S. § 10-9.16 *et seq.*; 2 O.S. § 20-40, *et seq.*; O.A.C. § 35:17-5-1, *et seq.*; Ark. Code Ann. § 15-20-901, *et seq.*; Ark. Code Ann. § 15-20-1101, *et seq.*; ANRC Reg. 1901.1, *et seq.*; ANRC Reg. 2001.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; ANRC Reg. 2201.1, *et seq.*

7. Every application of poultry litter to land in the IRW must be performed by a registered poultry farmer (Grower) or certified applicator consistent with a nutrient management plan (NMP) *and/or* animal waste management plan (AWMP) approved by agent(s) for the states of Oklahoma or Arkansas. The state-approved poultry litter management plans are specifically tailored to the each parcel of land and dictate the time, method, location, and amount of poultry litter that may be applied. *See* 2 O.S. §§ 10-9.7, 20-48; 2 O.S. § 10.9-16, *et seq.*; Ark. Code Ann. § 15-20-1108(b)(1); Ark. Code Ann. § 15-20-1001, *et seq.*; ANRC Reg. 2201.1, *et seq.*; ANRC Reg. 2101.1, *et seq.*; *see, e.g.*, Exs. 10-17; *see also, e.g.*, Young Dep. at 223:12-17 (Ex. 18); Parrish Dep. at 71:4-79:20, 235:21-236:3 (Ex. 19); Gunter Dep. at 74:6-12 (Ex. 20); Fisher II Dep. at 470:8-471:8, 472:15-473:7 (Ex. 21).

8. Poultry litter is applied in the IRW consistent with Oklahoma and Arkansas laws. *See, e.g.*, Peach Dep. at 37:15-39:4, 75:2-76:10, 90:3-12, 92:25-93:6, 95:20-96:11, 114:14-117:7 (Ex. 6); Thompson Dep. at 16:15-22:25, 31:7-31:23, 42:13-43:7 (Ex. 22); Strong Dep. at 171:21-173:18 (Ex. 23); Fisher I Dep. at 146:22-149:1 (Ex. 24); Fisher II Dep. at 473:15-23 (Ex. 21); Tolbert Dep. at 160:4-164:17 (Ex. 25); P.I.T. at 1301:6-1303:8, 2002:6-2003:5, 2005:7-16, 2006:12-15 (Ex. 5); Littlefield Dep. at 23:19-21, 43:3-15 (Ex. 26); Phillips Dep. at 63:18-23 (Ex. 27); Traylor Dep. at 11:16-12:11 (Ex. 28); *see also, e.g.*, Exs. 10-17. Plaintiffs have not identified evidence demonstrating that Defendants apply poultry litter in a manner contrary to the specific instructions provided by those States under the comprehensive poultry litter regulations.

9. Poultry growers ("Contract Growers" or "Growers") are independent farmers and ranchers who contract with Defendants to raise poultry. *See* Butler Dep. at 118:23-119:2 (Ex. 29); P.I.T. at 1336:12-1339:3, 1374:23-1375:14, 2025:9-15, 2030:7-2032:19, 2035:2-7, 2040:10-24, 2049:8-10 (Ex. 5); Exs. 30-35.

10. Poultry are raised in houses or barns owned by Contract Growers. *See* P.I.T. at 1371:7-11, 1386:6-12, 2030:7-15 (Ex. 5); Anderson Dep. at 203:12-24 (Ex. 36); Exs. 30-35; *see, e.g.*, Ex. 30 at TSN22977SOK ¶2(A); Ex. 33 at SIM AG 37096 ¶3(b).

11. Growers typically purchase the bedding material—usually consisting of rice hulls or wood shavings—to place inside the poultry houses or barns to provide a soft and absorbent material on which to raise poultry. *See* Butler Dep. at 239:2-4 (Ex. 29); P.I.T. at 1338:17-1339:3, 2033:2-8 (Ex. 5); Exs. 30-35; *see, e.g.*, Ex. 30 at TSN22977SOK ¶2(A); Ex. 33 at SIM AG 37096 ¶3(b); *see also* Ex. 4 ("Wood shavings, sawdust, and soybean, peanut, or rice hulls are all common manure carriers added to the poultry house floor and utilized for raising four to eight flocks on a single placement.").

12. "Poultry litter consists of fecal excrement and … bedding material … and other components such as feathers and soil. Wood shavings, sawdust, and soybean, peanut, or rice hulls are all common" bedding materials. Ex. 4; *see* Butler Dep. at 82:9-25 (Ex. 29).

13. Growers, not Defendants, decide when to clean out poultry litter from their poultry houses or barns. *See* P.I.T. at 1341:13-17, 1390:8-25, 2023:24-2024:6, 2031:20-23, 2032:9-11 (Ex. 5); Butler Dep. at 78:25-83:4 (Ex. 29).

14. Growers, not Defendants, own the poultry litter generated on their farms. *See* P.I.T. at 1372:2-9, 1376:15-1377:1, 1380:1-6, 2021:23-2022:2, 2033:25-2034:10, 2045:6-18, 2048:14-2049:6 (Ex. 5); Ex. 37 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, 11, Saunders Aff. ¶¶5, 6; Exs. 30-35; *see*, *e.g.*, Ex. 32 at PFIRWP-024054 ¶II(H); Ex. 33 at SIM AG 37099 ¶7.

15. Growers sell, distribute, store or use their poultry litter at their own discretion. *See* P.I.T. at 1340:3-1342:17, 1376:15-1377:14, 1390:17-19, 1391:9-16, 1394:7-1395:15, 2023:24-2024:6, 2024:25-2025:15, 2031:24-25, 2032:12-25, 2033:10-23, 2034:9-25, 2045:6-2046:9, 2052:21-2053:14 (Ex. 5); Littlefield Dep. at 53:2-9 (Ex. 26); Butler Dep. at 78:16-24 (Ex. 29); Ex. 37 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, Saunders Aff. ¶¶5, 6.

16. If a Grower decides to apply poultry litter as a fertilizer to the Grower's own farm or pasture land, the Grower, not Defendants, determines the time, method, location, and amount of poultry litter to be applied, subject to applicable state and federal laws and regulations. *See* Littlefield Dep. at 53:2-9 (Ex. 26); P.I.T. at 1341:22-1342:17, 1377:2-14, 1390:17-19, 1391:9-16, 2023:24-2024:6, 2031:24-25-2032:12-15, 2033:13-23, 2045:24-2046:9 (Ex. 5); Ex. 37 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶¶7, 8, Saunders Aff. ¶¶5, 6; Undisputed Facts ¶7.

17. If a Grower decides to sell or distribute poultry litter that is removed from the Grower's poultry houses or barns, the Grower, not Defendants, determines the buyer, timing,

quantity, and price for the transaction. *See* P.I.T. at 1341:18-21, 1376:15-1377:1, 1391:9-16, 1394:7-1395:15, 2024:25-2025:15, 2032:16-19, 2032:22-25, 2033:10-12, 2034:9-25, 2045:20-23, 2052:21-2053:14 (Ex. 5); Butler Dep. at 78:16-24 (Ex. 29); Ex. 37 at Hunton Aff. ¶¶4, 8, Pigeon Aff. ¶¶6, 7, Reed Aff. ¶8, Saunders Aff. ¶6.

18. If a Grower sells or distributes poultry litter, the Grower, not Defendants, receives and retains the proceeds from the sale or distribution. *See* Butler Dep. at 243:3-17 (Ex. 29); Fisher I Dep. at 317:13-20 (Ex. 24); P.I.T. at 2052:21-2053:14 (Ex. 5); Ex. 37 at Hunton Aff. ¶4, Pigeon Aff. ¶6, Reed Aff. ¶11.

19. Approximately one-half of all poultry litter used as fertilizer in the IRW is land-applied by non-party farmers and ranchers who are not poultry Growers, but who purchase or obtain the litter from Growers or other sources (not Defendants). *See* Exs. 38-41.

20. The poultry litter laws of Oklahoma and Arkansas regulate the non-party farmers and ranchers who land apply poultry litter, not the poultry integrators with whom the Growers enter into contracts. *See* Gunter Dep. at 78:8-80:18; 152:8-157:1 (Ex. 20); Peach Dep. at 117:8-24, 120:12-122:9 (Ex. 6); Parrish Dep. at 201:2-202:3 (Ex. 19); Littlefield Dep. at 20:20-24:22, 32:7-38:6 (Ex. 26); *see generally* 2 O.S. §§ 10-9.3, 10-9.4, 10-9.5.F(1), 10-9.7, 10-9.7.C, 10-9.17, 10-9.18; Ark. Code Ann. § 15-20-1001, *et seq.*; Ark. Code Ann. §§ 15-20-904, 15-20-1113.

21. The only poultry litter regulation specifically directed towards Defendants is Oklahoma's rule that poultry integrators may not contract with any Grower who has not completed the State's required program to educate Growers on the appropriate use of their litter. *See* 2 O.S. § 10-9.5.G; Gunter Dep. at 154:9-157:1 (Ex. 20).

22. The contracts entered into between the Growers and the poultry integrator Defendants do not infringe on the Growers' ownership and use of the litter, with the exception of

provision(s) requiring Growers to comply with all federal, state and local laws and regulations related to the sale, distribution, storage, management or use of poultry litter. *See* P.I.T. at 1340:22-1341:12, 1390:4-7, 2023:24-2024:6 (Ex. 5); Exs. 30-35; *see, e.g.*, Ex. 30 at TSN22977SOK – TSN22978SOK ¶¶2(F), 2(H), 11(G); Ex. 31 at GE 41403 ¶V(A); Ex. 32 at PFIRWP-024052 – PFIRWP-024062 ¶¶II(F), III(A)(9)-(11), VI(A)-(G); Ex. 33 at SIM AG 37096 ¶3(o); Ex. 34 at CM-000001372 ¶3; Ex. 35 at CARTP172228 ¶7.

LEGAL STANDARD

"Summary judgment … is an important procedure 'designed to secure the just, speedy and inexpensive determination of every action.'" *Culp v. Sifers*, 550 F. Supp. 2d 1276, 1281 (D. Kan. 2008) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)). Summary judgment is appropriate where "there is no genuine issue as to any material fact and … the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party is entitled to summary judgment as a matter of law where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. Where the movant shows the "absence of a genuine issue of material fact, the non-movant may not rest on its pleadings but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof." *Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-52 (1986) (requiring non-moving party to provide admissible evidence "on which a jury could reasonably find for the plaintiff"); *Matsushita Elec. Indus. v. Zenith*, 475 U.S. 574, 586 (1986) ("[plaintiff] must do more than simply show that there is some metaphysical doubt as to the material facts").

ARGUMENT

I. PLAINTIFFS HAVE NOT DEMONSTRATED A NUISANCE *PER SE*

As an initial matter, Plaintiffs are incorrect that Defendants' conduct, even as they allege it, constitutes a nuisance *per se*. Plaintiffs allege that Defendants have committed a nuisance *per se* because the land application of poultry litter has allegedly caused, or is likely to cause, pollution in the IRW. *See* SAC ¶¶102-103 (citing 27A O.S. § 2-6-105(a) and 2 O.S. § 2-18.1). But, even accepting this, *arguendo*, Plaintiffs' claim of nuisance *per se* still fails because Plaintiffs have no evidence that the land application of poultry litter is an inherently harmful activity that constitutes a nuisance at all times, regardless of the pertinent circumstances.

A nuisance *per se* "is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings." *Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1276 n.6 (Okla. 1991); *see McPherson v. First Presbyterian Church*, 248 P. 561, 564 (Okla. 1926) (same). Conversely, a nuisance *per accidens* is "an act, occupation or structure which is not a nuisance *per se* but which may become a nuisance by virtue of the circumstances, location or surroundings." *Id.*; *see British-Am. Oil Prod. Co. v. McClain*, 126 P.2d 530, 532-33 (Okla. 1942); *Bryson v. Ellsworth*, 200 S.W.2d 504, 505 (Ark. 1947).

The land application of poultry litter is *not* an act that is a nuisance at all times and under any circumstances, regardless of the location and surroundings. To the contrary, the use of poultry litter is a statutorily authorized and regulated agricultural activity. *See* Undisputed Facts ¶¶6-7. Indeed, the State of Oklahoma has repeatedly admitted that poultry litter is a safe and effective fertilizer when used in compliance with Arkansas' and Oklahoma's regulations. *See* Undisputed Facts ¶4; *see also id.* at ¶¶3, 5. Accordingly, the application of poultry litter in the IRW cannot be a nuisance *per se*. Plaintiffs' claim to the contrary must be dismissed.

II. SUMMARY JUDGMENT SHOULD BE GRANTED ON PLAINTIFFS' CLAIM OF PRIVATE NUISANCE

Summary judgment is also appropriate on Plaintiffs' allegation of private nuisance

because Plaintiffs have failed to plead or support the requisite interference with a possessory property interest. In order to demonstrate private nuisance, Plaintiffs must allege and provide evidence that: (1) Oklahoma maintains possessory title or ownership interests in specific properties in the IRW; and (2) the alleged nuisance interferes with Oklahoma's *private* use and enjoyment of those properties in a manner distinct from the public's use and enjoyment of the same. Plaintiffs have failed to satisfy either requirement. The SAC does not allege any state-held possessory property rights in the lands of the IRW, focusing instead only on alleged state ownership of the waters. Similarly, Plaintiffs have failed even to allege that Defendants' conduct has interfered with the State's *private* use and enjoyment of either land or waters within the IRW. Accordingly, Plaintiffs' claim for private nuisance should be dismissed in its entirety.

A. Plaintiffs Have Failed to Identify Relevant Possessory Property Interests

A claim of private nuisance requires a possessory property right in the specific property that is interfered with by the alleged nuisance. *See* Restatement (2d) of Torts § 821E; *Nichols v. Mid-Continent Pipe Line Co.*, 933 P.2d 272, 277 (Okla. 1996) (citing Restatement); *Ozark Poultry Prods., Inc. v. Garman*, 472 S.W.2d 714, 715-16 (Ark. 1971) (defining public and private nuisance). But Plaintiffs do not plead ownership of any lands in the IRW. [2]

[2] In defining the State as a party, Plaintiffs allege that:

> The State of Oklahoma, without limitation, has an interest in the beds of navigable rivers to their high water mark, as well as all waters running in definite streams. Additionally, the State of Oklahoma holds all natural resources, including the biota, land, air and waters located within the political boundaries of Oklahoma in trust on behalf of and for the benefit of the public.

SAC ¶5. Thus, Plaintiffs' only identified possessory interest is in the waters and navigable rivers. Although Plaintiffs reference a trustee interest in "all natural resources, including the biota, land [etc]", this Court previously ruled that these interests are insufficient to constitute a "possessory property interest" for purposes of trespass (and thus, by virtue of the law, for private nuisance as well), *see* June 15, 2007 Hearing Tr. at 176:11-22 (Ex. 1), and required Plaintiffs to file the SAC containing more detailed allegations. The only possessory interest set out in the SAC pertains to waters in the state. *See* SAC ¶119; *infra* at 10.

The Court previously ordered Plaintiffs "to specifically set forth those properties" in which the State of Oklahoma maintains a possessory property interest within the IRW. June 15, 2007 Hearing Tr. at 176:11-22 (requiring Plaintiffs to replead trespass claims "because clearly the State doesn't have standing to assert trespass over all the lands, biota, et cetera … within the IRW within the State of Oklahoma") (Ex. 1). Despite this clear directive, the SAC identified only a generic "possessory property interest in the water in that portion of the [IRW] located within the territorial boundaries of the State of Oklahoma which runs in definite streams, formed by nature, over or under the surface." SAC ¶119.[3] To further clarify this point, Plaintiffs' Response in Opposition to Defendants' Motion for Partial Summary Judgment as to Plaintiffs' Time Barred Claims, Dkt. No. 1917 (Mar. 10, 2009) ("Statute of Limitations Opposition"), admits that Count 4 pertains solely to these waters, and identifies no other alleged property interest. *See id.* at 14-16 (alleging State interest in protecting public waters).

B. The Alleged Nuisance Has Not Interfered With Plaintiffs' Private Use and Enjoyment of the Property

In addition to identifying the requisite possessory property interests, to maintain a private nuisance claim Plaintiffs must demonstrate that the alleged interference with the "*private* use and enjoyment" of the State's property is distinct from any injury to the public's use and enjoyment thereof. Restatement (2d) of Torts § 821D (emphasis added). As the Restatement explains:

> Uses of land are either private or public. The uses that members of the public are privileged to make of … parks, rivers and lakes, are "public" as distinguished from "private." By private use is meant a use of land that a person is privileged to make as an individual, not as a member of the public. [Private nuisances] do not deal with invasions of interests in public uses of land, and the phrase 'use and enjoyment' is always used here in the sense of "private use and enjoyment."

Id. at cmt. c; *see also Nichols*, 933 P.2d at 277 (adopting § 821D as harmonious with Oklahoma

[3] These same water rights are the subject of Defendants' pending Rule 19 motion to dismiss for failure to join the Cherokee Nation. As explained in that motion, the Cherokee Nation, not the State, holds most, if not all, water rights in the IRW. *See* Dkt. No. 1788 (Oct. 31, 2008).

law); *Ozark*, 472 S.W.2d at 716 (private nuisance requires showing of "special damage to [a plaintiff's] person or property, differing in kind and degree from that which is sustained by other persons who are subjected to similar injury") (internal quotations omitted). Yet, Plaintiffs have neither pleaded nor demonstrated any interference with Oklahoma's *private* use and enjoyment of any specific property interest held by the State in the IRW in a manner distinct from the *public's* use and enjoyment of the same.[4] In fact, Plaintiffs' Statute of Limitations Opposition expressly admits that Count 4 is limited to public interests: "As indicated by Count 4, the State is seeking damages and other relief for … public rights, not private rights." Dkt. No. 1917 at 15 (Mar. 10, 2009); *see id.* at 16 ("In this context, 'public' is pertaining to the people, or affecting the community at large."). As the Restatement makes clear, such interests are antithetical to a claim of private nuisance. Plaintiffs thus acknowledge that they cannot carry their burden on this claim.[5]

Because Plaintiffs neither claim ownership in specific properties nor demonstrate the requisite interference with these identified property interests, summary judgment should be granted to dismiss Plaintiffs' claim of private nuisance.

III. DEFENDANTS DO NOT CONTROL THE ALLEGED NUISANCE-CAUSING INSTRUMENTALITY AT THE TIME THE ALLEGED NUISANCE OCCURS

Even if Plaintiffs could demonstrate property interests and interference sufficient to support a nuisance claim, Count 4 should still be dismissed because nuisance lies only against a defendant who actually controlled or substantially participated in the nuisance-causing activity. *See Burlington N. & Santa Fe Ry. v. Grant*, 505 F.3d 1013, 1026 (10th Cir. 2007); *Tioga Public*

[4] The SAC does not differentiate between "impairment of the *State of Oklahoma's and the public's* beneficial use and enjoyment of the IRW." SAC ¶98 (emphasis added).

[5] This is not surprising, as the Restatement notes that the types of property Plaintiffs identify can *never* substantiate a claim of private nuisance because interference with such rights is necessarily with public, not private, use of such land. *See* Restatement (2d) of Torts § 821D cmt. c.

School Dist. #15 v. U.S. Gypsum Co., 984 F.2d 915, 920 (8th Cir. 1993). Here, no evidence demonstrates that Defendants own the poultry litter in question, or otherwise control or substantially participate in its application. Indeed, the State itself substantially controls those decisions through its poultry litter laws and farm-specific litter application permits. *See* Undisputed Facts ¶¶6-7. Therefore, no nuisance claim may lie.

In seeking industry-wide damages for an alleged public nuisance, Count 4 is substantially similar to claims asserted in the recent lead paint litigation. The decisions of the Supreme Courts of New Jersey and Rhode Island conclusively rejecting those legally deficient theories are particularly instructive here. *See LIA*, 951 A.2d at 449; *In re Lead Paint*, 924 A.2d at 499.

Lead paint can be harmful to human health, but is not *per se* injurious. Rather, it presents a risk of harm only where improper application or maintenance results in exposure through "peeling, chipping or [an] otherwise … deteriorated condition." *LIA*, 951 A.2d at 437-38; *In re Lead Paint Litig.* 924 A.2d at 489-91. Accordingly, in New Jersey and Rhode Island, state law placed the burden (and attendant liability) for proper application and maintenance of lead-based paints on those persons who actually own the property and the paint, and control the application and maintenance of the paint. *See id*. at 491-94, 499-502; *LIA*, 951 A.2d at 438-39. Nevertheless, the attorneys general of these two states filed nuisance claims against manufacturers who generated the lead paint, but did not control the myriad individual instances in which the paint was applied to a particular property. *See id.* at 439-40.

Applying well settled principles of nuisance law, both states' Supreme Courts disagreed. As the Rhode Island Supreme Court concluded, "a defendant must have *control* over the instrumentality causing the alleged nuisance *at the time the damage occurs*" and not simply at the time the alleged nuisance-causing product is generated. *LIA*, 951 A.2d at 449 (emphasis in

original) (internal quotations omitted); *see id.* at 449-50 (compiling authorities for control requirement).[6] Indeed, the court noted that no claim of nuisance may lie without proof that "defendants were in control of the [nuisance] *at the time* it caused harm to Rhode Island children." *Id.* at 435 (emphasis in original). The lead paint manufacturers, it held, were the wrong defendants. Rather, the property owners—responsible for application and upkeep of the lead paint—were the persons actually "in control of the instrumentality causing the alleged nuisance" at the time it presented a risk. *Id*. at 449, 455-56.

The New Jersey Supreme Court too held that "a public nuisance, by definition, is related to conduct, performed in a location within the actor's control, which has an adverse effect on a common right." *In re Lead Paint Litig*., 924 A.2d at 499. And, where (as here) the plaintiff is "a public entity[, it] may only seek to abate, at the expense of the one in control of the nuisance." *Id*.[7] Accordingly, the court concluded that to allow such claims absent evidence of control over the individual applications of the product in question "would stretch the concept of public nuisance far beyond recognition and would create a new and entirely unbounded tort antithetical to the meaning and inherent theoretical limitations of the tort of public nuisance." *Id*. at 494.

The present case is analogous to the lead paint litigation. As with the lead paint regulations, both Oklahoma and Arkansas recognize that the non-party farmers and ranchers who own, buy, sell and apply poultry litter, not Defendants, control the instrumentality at the point that Plaintiffs allege it can cause a nuisance if not used properly. *See* Undisputed Facts ¶¶9-18,

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[6] The Court recognized the elements of a common law claim of public nuisance as: "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred." *LIA*, 951 A.2d at 446.

[7] *See also* Restatement (2d) of Torts § 834 cmt. d (1977) ("When a person is only one of several persons carrying on an activity, his participation must be substantial before he can be held liable for the harm resulting from it.").

20-21. Nevertheless, Plaintiffs attempt to stretch the tort of nuisance to reach deep pockets that exercise no control over the instrumentality at that point.

Plaintiffs allege a nuisance caused by the land application of poultry litter. SAC ¶¶47-68. But, Plaintiffs do not allege—let alone identify any evidence to prove—that Defendants own the poultry litter or participate in any way in the thousands of individual instances where it is applied to land in the IRW. Instead, Plaintiffs contend that Defendants are liable for the alleged nuisance because they "dominat[e] and control" the Growers with whom they contract. SAC ¶¶31-46 (alleging "domination and control" of "each stage of the poultry growing process"). But the raising of poultry is immaterial to Plaintiffs' nuisance claim, as growing birds is not the alleged nuisance-causing activity. Instead, the challenged activity at issue is the land application of poultry litter by non-parties to land in the IRW according to field-specific litter-application schedules issued by Arkansas or Oklahoma—an activity in which Defendants do not participate.

First, Plaintiffs do not even allege, let alone offer any proof, that Defendants contract with or control the non-party farmers or ranchers who apply litter purchased on the open-market. *See* SAC ¶¶31-46 (alleging "domination and control" over only each Defendants' "Respective Poultry Growers").[8] Plaintiffs themselves admit that approximately half of all poultry litter used in the IRW is land-applied by these non-party farmers and ranchers who purchase the litter from Growers or other sources. *See* Undisputed Facts ¶19.[9] Accordingly, Plaintiffs' nuisance claim is based in substantial part on conduct that even Plaintiffs do not attribute to Defendants.[10]

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[8] Indeed, Arkansas law indemnifies Growers against liability for the conduct of these non-party farmers and ranchers that obtain poultry litter on the open-market. *See* Ark. Code Ann. § 15-20-1109(a) ("Upon sale or transfer of poultry litter from a poultry feeding operation … the poultry feeding operation shall not be responsible for the ultimate utilization of the poultry litter.").

[9] *See also, e.g.*, Ex. 8 ("The Oklahoma Litter Market website [connects] buyers, sellers and service providers of poultry litter.").

[10] At a minimum, partial summary judgment is appropriate as to the conduct of these non-parties

Nor does the record support any finding of Defendants' "domination and control" over their Growers' decisions about whether, how, when, where, or in what amount to use, sell or trade their poultry litter. *See* Undisputed Facts ¶¶13-18. Plaintiffs' allegations of control pertain solely to the actual raising of poultry. They allege that Defendants "control[] each stage of the growing process," and note that Defendants own the birds, establish standards for their care, and supply feed and medicine. SAC ¶¶31-41. Certainly, Defendants contract with Growers for growing services and, as with any such services contracts, specify certain performance standards. *See generally* 28-33. But that relationship regards the growing process only.[11]

The record is otherwise clear that Defendants do not dominate, participate in, or in any way control, the Growers' sale, distribution, storage, or use of poultry litter. *See* Undisputed Facts ¶¶9-18. Growers, not Defendants, typically purchase the bedding material for, and decide when to clean out poultry litter from, their poultry houses or barns. *See* Undisputed Facts ¶¶11-13. Growers, not Defendants, own the resulting poultry litter. *See* Undisputed Facts ¶14.[12]

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who obtain poultry litter on the open-market and apply it to land in the IRW.

[11] It is blackletter law that contractual relationships such as these are task-specific. *See* Restatement (3d) of Agency § 2.01 cmt. d (describing "special agents"). "A person can be an agent for one purpose, but not another." *Bell v. Apache Supply Co.*, 780 S.W.2d 529, 530 (Ark. 1989); *see Tirreno v. Mott*, 453 F. Supp. 2d 562, 565 (D. Conn. 2006); *Naujoks v. Suhrmann*, 337 P.2d 967, 969 (Utah 1959). Defendants contract for growing services; not to direct the application or sale of fertilizer. *See* Undisputed Facts ¶9.

[12] Poultry litter is the indivisible result of the combination of principally bedding material and poultry feces. *See* Undisputed Facts ¶12. Where a combination of materials results in "tangible personal property … that is substantially new and different from that which originally existed," a new species of property is created. *Apache Corp. v. Okla. Tax Comm'n*, 98 P.3d 1061, 1066 (Okla. 2004); *see Dolese Bros. v. Okla. Tax Comm'n*, 64 P.3d 1093, 1100 (Okla. 2003); *Cain's Coffee Co. v. City of Muskogee*, 44 P.2d 50 (Okla. 1935); *Brubridge v. Bradley Lumber Co.*, 239 S.W.2d 285, 288 (Ark. 1951); *Eaton v. Langley*, 47 S.W. 123, 126 (Ark. 1898). In the absence of an express agreement or rule of law to the contrary, ownership of such property vests according to custom and usage. *Schulte v. Apache Corp.*, 949 P.2d 291, 297 (Okla. 1995); *Pub. Serv. Co. of Okla. v. Home Builders Ass'n of Realtors*, 554 P.2d 1181, 1185 (Okla. 1976); *Spencer v. Board of Educ.*, 246 P.2d 333, 334 (Okla. 1952). Here, all agree that Growers own the resulting poultry litter. *See* Undisputed Facts ¶14. Indeed, Plaintiffs would be hard pressed

Growers, not Defendants, determine whether, when and how to sell, distribute, store or use the poultry litter, *see* Undisputed Facts ¶¶15-17, and retain all proceeds from the sale or distribution of poultry litter, *see* Undisputed Facts ¶18.[13] Growers using their own litter determine the time, method, location, and amount of poultry litter to be applied consistent with their field-specific, state-approved litter management plans. *See* Undisputed Facts ¶16. Consistent with these facts, Oklahoma and Arkansas litter laws regulate these parties, not Defendants. *See* Undisputed Facts ¶¶20-21. In sum, with the possible exception of a handful of past company-owned farms, the record is clear that no Defendant participates in the alleged nuisance-causing activity—the land application of poultry litter.[14]

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to articulate a theory of property law that transfers ownership of Growers' bedding material to individual Defendants on account of it having been used by Defendants' birds.

[13] Certainly, some Defendants' contracts require Growers to comply with applicable state laws and regulations. *See* Undisputed Facts ¶22. But provisions such as these do not demonstrate any control over poultry litter or a Grower's use or sale thereof. Moreover, courts have rejected the argument that control may be established from contractual provisions requiring compliance with applicable laws. *See Concrete Sales & Servs., Inc. v. Blue Bird Body*, 211 F.3d 1333, 1339 (11th Cir. 2000); *Jordan v. S. Wood Piedmont*, 805 F. Supp. 1575, 1580 (S.D. Ga. 1992).

[14] Plaintiffs may invoke Restatement (2d) of Torts § 427B, which provides that "[o]ne who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve … the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such … nuisance." *Id.* ("[This provision] applies in particular where the contractor is directed or authorized by the employer to … create such a nuisance, and where the … nuisance is a necessary result of doing the work."). But, any reliance on Section 427B would be misplaced. First, Defendants do not maintain any contractual relationship with the non-party farmers and ranchers that apply poultry litter obtained on the open-market, *see supra* at 14, and thus, at a minimum, Section 427B is wholly inapplicable to that universe of conduct. Second, Defendants contract with Growers solely for the purpose of raising poultry, an activity that, even Plaintiffs admit, cannot cause the alleged nuisance. *See supra* at 14-15. Third, it is undisputed that Defendants have never directed or authorized any aspect of the Growers' disposition of the poultry litter, including its land application in the IRW. *See supra* at 15-16. Rather, the states of Oklahoma and Arkansas directed and authorized the specific aspects of the Grower's disposition of poultry litter by issuing them plans that direct the Growers specifically how and where to spread the litter. *See id.*; Undisputed Facts ¶¶6-7. Finally, run off or eutrophication (the nuisance alleged by Plaintiffs in this case) is not a "necessary result" of raising poultry or using poultry litter as a fertilizer in the IRW. For instance, some growers raise poultry in the IRW but then export their litter from the IRW. *See, e.g.*, Butler Dep. at 243:18-

Here, as in the lead paint litigation, Plaintiffs' industry-wide nuisance claims ignore Defendants' lack of control over the alleged nuisance-causing instrumentality. Plaintiffs admit that poultry litter is a useful and safe product when used properly. *See* Undisputed Facts ¶4; *see also id.* at ¶¶3, 5. Accordingly, Plaintiffs' claim boils down to an allegation that the individuals who apply litter must be using it improperly. However, even if litter were misapplied or improperly used in violation of state laws by the property owners who create, own, control, sell, or use it in the IRW, it is these non-party farmers and ranchers—not Defendants—who actually own and control the poultry litter at the time it causes the alleged harm. As a result, Defendants cannot be held liable for the alleged nuisance. *See LIA*, 951 A.2d at 449-50; *In re Lead Paint Litig.*, 924 A.2d at 499.

IV. CONDUCT EXPRESSLY AUTHORIZED BY AND PERFORMED IN COMPLIANCE WITH STATE LAW CANNOT CONSTITUTE A NUISANCE

Count 4 further fails because the tort of nuisance does not reach conduct that is expressly authorized by and performed in compliance with existing laws and regulations. Courts long ago established that nuisance law does not reach activities that have been sanctioned, authorized and regulated by the legislature. *See, e.g.*, *Miller v. Mayor of New York*, 109 U.S. 385, 395 (1883); *Columbus v. Union Pac. R.R.*, 137 F. 869, 872 (8th Cir. 1905); *Piggott v. Eblen*, 366 S.W.2d

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244:8 (Ex. 29); Fisher I Dep. at 61:24-62:4 (Ex. 24). Moreover, there is no evidence that every grower that uses litter in the IRW creates a nuisance. In fact, Oklahoma's statements about whether poultry litter is an appropriate fertilizer or an inevitable pollutant are at war with themselves. As noted above, the agents of the State of Oklahoma (including Attorney General Edmondson) have repeatedly said that poultry litter is a safe and effective fertilizer when used according to the litter management plans Oklahoma issues. *See* Undisputed Facts ¶4. However, in this litigation Oklahoma's attorneys have alleged that every single litter application—including those carried out precisely according to the State's instructions in a nutrient management plan—causes environmental damage and is unlawful. *See, e.g.*, Dkt. No. 1917 at 8 (Mar. 10, 2009); Ex. 42 at No. 9 (alleging that "each poultry grower operation … is a source of contamination"); Ex. 43 at No. 7 (describing the undifferentiated application of litter as a release of "hazardous substance[s]"); Ex. 44 at 2 Nos. 2-3 (describing every application of poultry litter in the IRW as a release or threatened release).

192, 195-96 (Ark. 1963); *E.I. du Ponte de Nemours Powder Co. v. Dodson*, 150 P. 1085, 1087 (Okla. 1915); *McKay v. City of Enid*, 109 P. 520, 521 (Okla. 1910). Oklahoma has codified this rule. *See* 50 O.S. § 4 (2008) ("Nothing … done or maintained under the express authority of a statute can be deemed a nuisance."); *City of Bartlesville v. Ambler*, 499 P.2d 433, 435 (Okla. 1971).[15] Because the challenged application of poultry litter is expressly authorized by Oklahoma and Arkansas laws and regulations, Plaintiffs' nuisance claim must fail.

Oklahoma and Arkansas regulate the application of poultry litter from soup to nuts, dictating who may apply litter, with what training and licensing, where they may do so, under what conditions, and in what amounts on each individual parcel of land. *See* Undisputed Facts ¶¶6-7. For example, Growers must register with the Oklahoma State Board of Agriculture, the Oklahoma Department of Agriculture, Food and Forestry ("ODAFF"), or the Arkansas Natural Resource Commission ("ARNC"),[16] and maintain records detailing the disposition of poultry litter generated from their operations.[17] Additionally, Growers using litter must obtain a nutrient management, animal waste management, *and/or* poultry litter management plan(s) from ODAFF or ARNC, specifically tailored to the land and intended use of the poultry litter.[18] All other applications in the IRW must be made by certified applicators pursuant to state-approved plans.[19]

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[15] Arkansas has not codified a general nuisance statute. However, the Arkansas Legislature has recognized this common law principle, *see*, *e.g.*, *Piggott*, 366 S.W.2d at 195-96, and codified the rule in other contexts, *see*, *e.g.*, Ark. Code Ann. § 14-54-1502(b) (under Arkansas municipal health and safety codes, "a common nuisance shall not include conduct which is permitted by and in conformance with city ordinances").

[16] *See* 2 O.S. §§ 10-9.3, 10-9.4, 20-44(A)(1); Ark. Code Ann. § 15-20-904(b); ANRC Reg. 1901.1, *et seq.*; *see also* Parrish Dep. at 27:10-28:8 (Ex. 19).

[17] *See* 2 O.S. §§ 10-9.7.C(7), 20-48(D); Ark. Code Ann. § 15-20-1108(c)(3); *see also* Parrish Dep. at 140:18-141:13 (Ex. 19).

[18] *See* 2 O.S. §§ 10-9.7, 20-48; Ark. Code Ann. § 15-20-1108(b)(1); ANRC Reg. 2201.1, *et seq.*; *see also* Young Dep. at 223:12-17 (Ex. 18); Parrish Dep. at 71:4-79:20, 235:21-236:3 (Ex. 19); *see*, *e.g.*, Exs. 10-16.

[19] *See* 2 O.S. § 10.9-16, *et seq.*; Ark. Code Ann. § 15-20-1001, *et seq.*; ANRC Reg. 2101.1, *et*

Yet, Plaintiffs have failed to develop any record evidence showing violations of these specific laws and regulations, and tying their alleged damages to those specific violations. *See* Undisputed Facts ¶8; *see, e.g.*, Fisher I Dep. at 146:22-149:1 (in four years of investigation in the IRW, Plaintiffs' field investigators failed to document any violations of state litter laws) (Ex. 24); *see also* Dkt. No. 1925 at 8 n.18 (Mar. 23, 2009). To the contrary, the undisputed evidence demonstrates that litter application in the IRW complies with the standards established by state law. *See* Undisputed Facts ¶8; *see, e.g.*, Thompson Dep. at 16:15-22:25, 31:7-23, 42:13-43:7 (Oklahoma DEQ has not found that the use of poultry litter has caused pollution to the waters of the state or violated the law) (Ex. 22); Peach Dep. at 37:15-39:4, 75:17-76:10, 90:3-12, 96:4-11, 114:14-117:7 (Oklahoma Secretary and Commissioner of Agriculture is not aware of any violation by Defendants or Growers) (Ex. 6); *id.* at 75:2-16, 95:20-96:3 (farmers in the IRW are "concerned with the environment" and "obey applicable statutes and regulations"); Fisher II Dep. at 473:15-23 (not aware of any application in violation of state-approved NMP or AWMP) (Ex. 21); P.I.T. at 1301:6-1303:8 (not aware of any widespread non-compliance or violations of Arkansas laws) (Ex. 5); *id.* at 2006:12-15 (not aware of any growers discharging poultry wastes into Oklahoma waters); Littlefield Dep. at 23:19-21 (no "bad actors" among farmers he inspects) (Ex. 26); Phillips Dep. at 63:18-23 (not aware of growers violating waste management rules) (Ex. 27); *see also, e.g.*, Exs. 10-17.

Lacking evidence of specific violations, Plaintiffs rely *solely* upon alleged violations of the general anti-pollution provisions of Oklahoma poultry litter laws and environmental statutes

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seq.; *see also* Gunter Dep. at 74:6-12 (Ex. 20). In Arkansas, both the certified applicator and landowner are required to maintain records relating to the poultry litter application for five years. Moreover, in Oklahoma, the certified applicators are required to file a report with the state identifying the source of the litter and the specific location(s), date(s) and amount(s) the litter was applied. *See* 2 O.S. § 10-9.18.

listed in Counts 7, 8 & 9 of Plaintiffs' SAC. However, as detailed in Defendants' Joint Motion for Summary Judgment on Counts 7, 8 & 9, Plaintiffs' reliance on these statutes is misplaced. *See* Dkt. No. ___, (May 18, 2009). Further, even if Plaintiffs' interpretation of Oklahoma law was valid—which it is not—Plaintiffs have not identified a violation of any provision of Arkansas law, which governs conduct in Arkansas. *See supra* at 1 n.1.[20]

In sum, Plaintiffs' nuisance claim seeks damages for conduct that Oklahoma and Arkansas authorized, regulated, licensed, and approved. The Arkansas and Oklahoma statutes regulating poultry litter express their respective legislature's best judgment as to the appropriate balance between the agricultural and economic benefits of poultry litter and sound environmental protections.[21] Count 4 impermissibly usurps these legislative judgments. *See Dodson*, 150 P. at 1087 ("when the Legislature allows or directs that to be done which would otherwise be a nuisance, it must be presumed that the Legislature is the proper judge of what the public good requires"). Plaintiffs have not built their case on specific evidence that poultry litter has been applied in violation of the state laws and regulations expressly approving the conduct. Accordingly, summary judgment should be granted on Count 4 in its entirety.[22]

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[20] Partial summary judgment is therefore appropriate as to claims for conduct in Arkansas.

[21] The Arkansas Legislature has recognized that "[l]itter provides nutrients that are beneficial to plant growth; The proper utilization of litter allows the addition of nutrients to the soil at a low cost." Ark. Code Ann. §§ 15-20-902 (1), (2). Moreover, Arkansas' laws were enacted to "regulate the utilization of poultry litter to protect the area while maintaining soil fertility." Ark. Code Ann. § 15-20-1102. Similarly, Oklahoma litter laws "assist in ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma." O.A.C. § 35:17-5-1; *see* 2 O.S. § 10-9.1-12.

[22] The Court previously inquired as to the scope of the "authorized by law" exception to a nuisance claim, and the extent to which it limits the State's ability to obtain either damages or an injunction. *See* July 5, 2007 Hearing Tr. at 48:8-51:3, 61:16-62:20 (Ex. 45). The exception requires dismissal of Plaintiffs' entire nuisance claim, not just the demand for injunctive relief.

The Oklahoma Supreme Court confirmed the scope of the exception in *McKay v. City of Enid*, 109 P. 520 (Okla. 1910), holding that:

> [A] grant to a railway company by the legislative department of the state or by a

V. PUBLIC NUISANCE DAMAGES MUST BE LIMITED TO ABATEMENT

Partial summary judgment as to Plaintiffs' claim for compensatory and punitive damages in connection with their public nuisance claim is separately appropriate on two other bases.[23] First, a public plaintiff may recover only abatement costs in a public nuisance suit. Second, damages are further limited by the free public services doctrine, which precludes recovery of the costs of services that the State would have provided even in the absence of this litigation.

A. Plaintiffs May Not Recover Compensatory Damages for Public Nuisance

Government entities asserting public nuisance claims cannot recover compensatory damages or damages for injuries incurred by private citizens. *See In re Lead Paint Litig.*, 924

> municipal corporation of authority to construct its railway tracks upon the streets or public highways is not an authorization to the company to violate private rights. Such authorization relieves the company only from liability to suit, civil or criminal, *at the instance of the government*, but the licensee must respond in damages for injury resulting to *private rights*."

Id. at 521 (emphasis added). The court again acknowledged this rule in *E.I. du Ponte de Nemours Powder Co. v. Dodson*, 150 P. 1085 (Okla. 1915), where it applied the "authorized by law" exception to deny private plaintiffs' request for injunctive relief, but also noted that *private* plaintiffs "in a proper action [may] be entitled to recover compensation for any damage to [their] property that [they] might be able to establish." *Id.* at 1087.

McKay and *Dodson* thus teach that where the State authorizes a particular activity, it may not subsequently seek either injunctive or monetary relief for conduct it had approved. A private plaintiff aggrieved by the conduct, however, while estopped from enjoining the state-approved conduct, may recover damages. As the court explained in *Dodson*, this distinction follows logically from the takings clause of the Oklahoma Constitution (Art. II § 23), because the State may not "take or damage *private property* at will without compensation," even by authorizing injury to it. *Id.* ("our Legislatures are under constitutional restraints in respect to *individual rights of property*") (emphasis added). As the Court explained, "although a nuisance may be legalized, and therefore protected from indictment against interference with it as a public nuisance, the one maintaining it may nevertheless be liable in damages to *an individual* for any damages he may sustain therefrom." *Id.* at 1087-88 (emphasis added). Such recovery, however, is not available to the State. *See* McKay, 109 P. at 521. This distinction, moreover, makes practical sense, as it prevents the State from suing for conduct it expressly approved.

[23] Plaintiffs seek recovery of monetary damages in the form of "damages, including special and direct damages, costs and expenses as a result of the nuisance for which [Plaintiffs are] entitled to receive compensation and reimbursement from the Poultry Integrator Defendants, jointly and severally," "exemplary and punitive damages," and "reasonable attorneys fees, court costs and interest pursuant to 12 O.S. § 940." SAC ¶¶105-107; *see also id.* at Prayer for Relief ¶¶1-9.

A.2d at 498-99, 502; *see also* W. Page Keeton, *et al.*, PROSSER & KEETON ON TORTS § 90, at 643 (5th ed. 1984) ("The remedies usually available [in public nuisance actions by the State] are those of criminal prosecution and abatement by way of an injunctive decree or order."); Restatement (2d) of Torts § 821(C)(1) cmt. a (remedies for a public nuisance are "prosecution for a criminal offense or a suit to abate or enjoin the nuisance").

The lead paint litigation is again instructive. "[A] public entity plaintiff … act[ing] in the place of the 'sovereign'" may not recover money damages for nuisance. *In re Lead Paint Litig.*, 924 A.2d at 502. Rather, "the only basis for a money damage remedy [in a public nuisance claim] arises in the context of a private action for public nuisance." *Id*. at 498.[24] In contrast, "the sovereign in public nuisance litigation, has only the right to abate." *Id.* (citing Restatement (2d) of Torts § 821(C)(2)(b)). Accordingly, "there is no right either historically, or through the [Restatement's] formulation, for the public entity to collect money damages in general. Rather, there is only a private plaintiff's right to recover damages through an action arising from a special injury." *Id.* at 498-99 (citing Restatement (2d) of Torts § 821(C)(1)); *see also LIA*, 951 A.2d at 446-47 (public entity alleging public nuisance may seek only abatement).[25]

Oklahoma has not modified or dispensed with this common law rule prohibiting a public entity from seeking monetary damages in a public nuisance action.[26] To the contrary, numerous

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[24] "[To] recover damages in an individual [private] action for public nuisance," an individual is also required to have "suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of the interference." Restatement (2d) of Torts at § 821(C)(1); *see* Restatement (2d) of Torts at § 821(C) cmt. (a); *see also In re Lead Paint Litig.*, 924 A.2d at 497 n.7 ("Unlike public nuisance, a private nuisance involves an 'invasion of another's interest in the private use and enjoyment of land.'").

[25] *See also City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1142 (Ill. 2004); *Balch v. State*, 164 P. 776, 777 (Okla. 1917).

[26] *See* 50 O.S. § 1, *et seq*. Pursuant to 50 O.S. § 8, "[t]he remedies against public nuisance are (1) indictment or information, or (2) a civil action, or, (3) abatement." *Id*. Although "a civil

legislative pronouncements reinforce this longstanding principle. For example, the statutes Plaintiffs cite in their claim of public nuisance *per se*, 2 O.S. § 2-18.1 and 27A O.S. § 2-6-105, limit remedies to abatement and/or administrative penalties *only*. *See* SAC ¶¶102-103. Additionally, the Oklahoma Environmental Quality Code distinguishes between remedies available to public and private litigants:

> It is the purpose of this Code to provide additional and cumulative remedies to prevent, abate and control pollution. Nothing contained in this Code shall be construed to abridge or alter rights of action or remedies under the common law or statutory law, criminal or civil; nor shall any provision of this Code, or any act done by virtue thereof, be construed as estopping *the state*, or *any municipality* or *person* in the exercise of their rights under the common law *to suppress nuisances or to abate pollution*. Nothing in this Code shall in any way impair or affect *a person's right to recover damages* for pollution.

27A O.S. § 2-3-506(A) (2008) (emphasis added). Thus, the common law rule controls.

Plaintiffs are attempting to graft an exclusively *private* remedy onto a *public* nuisance claim brought by a government entity, in contravention of clearly established nuisance law. Because Plaintiffs are proceeding in their official capacities to recover for alleged harms suffered equally by the State and its citizens in exercising a common right, *see* SAC ¶98; Dkt. No. 1917 at 14-17 (Mar. 10, 2009), Plaintiffs are barred from recovering compensatory damages. *See In re Lead Paint Litig.*, 924 A.2d at 498-99, 502; Restatement (2d) of Torts at § 821(C)(1).

B. Plaintiffs' Damages Claims for Services Rendered on Behalf of the Public are Barred by the Public Services Doctrine

Plaintiffs' claim is further limited by the Free Public Services Doctrine, which bars public entities from recovering through litigation the costs of general tax-supported public services. *See*

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action" is listed as a remedy for public nuisance, the Oklahoma legislature has not identified the types of damages available to public entities or private persons in such an action. *See* 50 O.S. §§ 8, 10. Because the legislature has not modified the common law rule it still stands. *See* 12 O.S. § 2; *Tate v. Browning Ferris, Inc.*, 833 P.2d 1218, 1225 (Okla. 1992) ("[nuisance statutes] cannot abrogate the common law by implication; rather, its alteration must be clearly and plainly expressed").

Pittsburgh v. Equitable Gas Co., 512 A.2d 83, 84 (Pa. Cmw. Ct. 1986) ("The cost of public services for protection from a safety hazard is to be borne by the public as a whole, not assessed against a tortfeasor whose negligence creates the need for the service.").[27] Many of the "costs" Plaintiffs allege are for services that are ordinarily provided to the general public regardless of this lawsuit. For example, Plaintiffs' "remediation" expert report demands that Defendants be ordered to pay approximately $1.035 billion for upgrades to publicly-owned and operated water treatment plants that draw drinking water from the IRW and supply it to the general public. *See* Ex. 46 at 29-31 §§ 4.4.1, 4.5.1, Tables 7 & 8 (combined Total Project Present Worth Cost of $1,034,476,000). Such claims are wholly inappropriate.

Under Oklahoma law, the legislature, not the Attorney General, controls the power of the purse. *See* Okla. Const. Art. V. § 55; Okla. Const. Art. IV. § 1. Accordingly, which programs to fund, and how to recoup their expense, is determined by the legislature. *See District of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) ("[T]the government's decision to provide tax-supported services is a legislative policy determination. It is not the place of the courts to modify such decisions."). In *United States v. Standard Oil*, 332 U.S. 301 (1947), the Supreme Court explained that:

> [The] exercise of judicial power to establish new liability [by granting costs incurred by the government for public services] … would be intruding within a field properly within Congress' control and as to a matter concerning which it has seen fit to take no action.

Id. at 316. Numerous courts have dismissed nuisance and other tort claims seeking to recover

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[27] *See also United States v. Standard Oil*, 332 U.S. 301, 316 (1947); *Koch v. Con. Edison Co. of N.Y., Inc.*, 468 N.E.2d 1, 8 (N.Y. 1984); *D.C. v. Air Florida, Inc.*, 750 F.2d 1077, 1080 (D.C. Cir. 1984) (affirming dismissal of city's claim for costs incurred for cleanup after a plane crash); *State ex rel. Div. of Family Servs. v. Standridge*, 676 S.W.2d 513, 516-17 (Mo. 1984); *Town of Freetown v. New Bedford Wholesale Tire*, 423 N.E.2d 997, 998 (Mass. 1981) (affirming dismissal of complaint to recover firefighting expenses caused by defendant's alleged nuisance).

costs and expenditures on public projects under this well-established rule. *See supra* at 24 n.27. Plaintiffs' demands for reimbursement for government services should be rejected.

VI. PLAINTIFFS' FEDERAL COMMON LAW NUISANCE CLAIM (COUNT 5) SHOULD BE DISMISSED

Finally, Plaintiffs also plead federal common law nuisance (Count 5). Federal common law can apply to interstate natural resource disputes. *See Texas Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640-41 (1981). However, in doing so federal common law applies general tort principals. *See Phoenix Mut. Life Ins. Co. v. Adams*, 30 F.3d 554, 564 (4th Cir. 1994); *Singer v. Black and Decker Corp.*, 964 F.2d 1449, 1453 (4th Cir. 1992); *FDIC v. Associated Nursery Sys., Inc.*, 948 F.2d 233, 236 (6th Cir. 1991); *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 577 (6th Cir. 1991). Moreover, federal common law draws from state common law where the two are not incompatible and share common policies. *See Royal Indem. Co. v. United States*, 313 U.S. 289, 296-97 (1941); *Critchlow v. First UNUM Life Ins. Co.*, 378 F.3d 246, 256 (2d Cir. 2004); *Krishna v. Colgate Palmolive Co.*, 7 F.3d 11, 14 (2d Cir. 1993); *Cefalu v. B.F. Goodrich Co.*, 871 F.2d 1290, 1297 (5th Cir. 1989); *Nachwalter v. Christie*, 805 F.2d 956, 959-60 (11th Cir. 1986). The rules set out above regarding Plaintiffs' state law nuisance claims are general principles of nuisance law. As such, Plaintiffs' federal and state nuisance claims should be read together, and dismissed together. *See Marcus v. AT&T Corp.*, 138 F.3d 46, 57 n.2 (2d Cir. 1998) (reading federal and state common law fraud claims together).

CONCLUSION

For the foregoing reasons, summary judgment should be granted, in whole or in part, with respect to Plaintiffs' state and federal common law claims for nuisance.

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